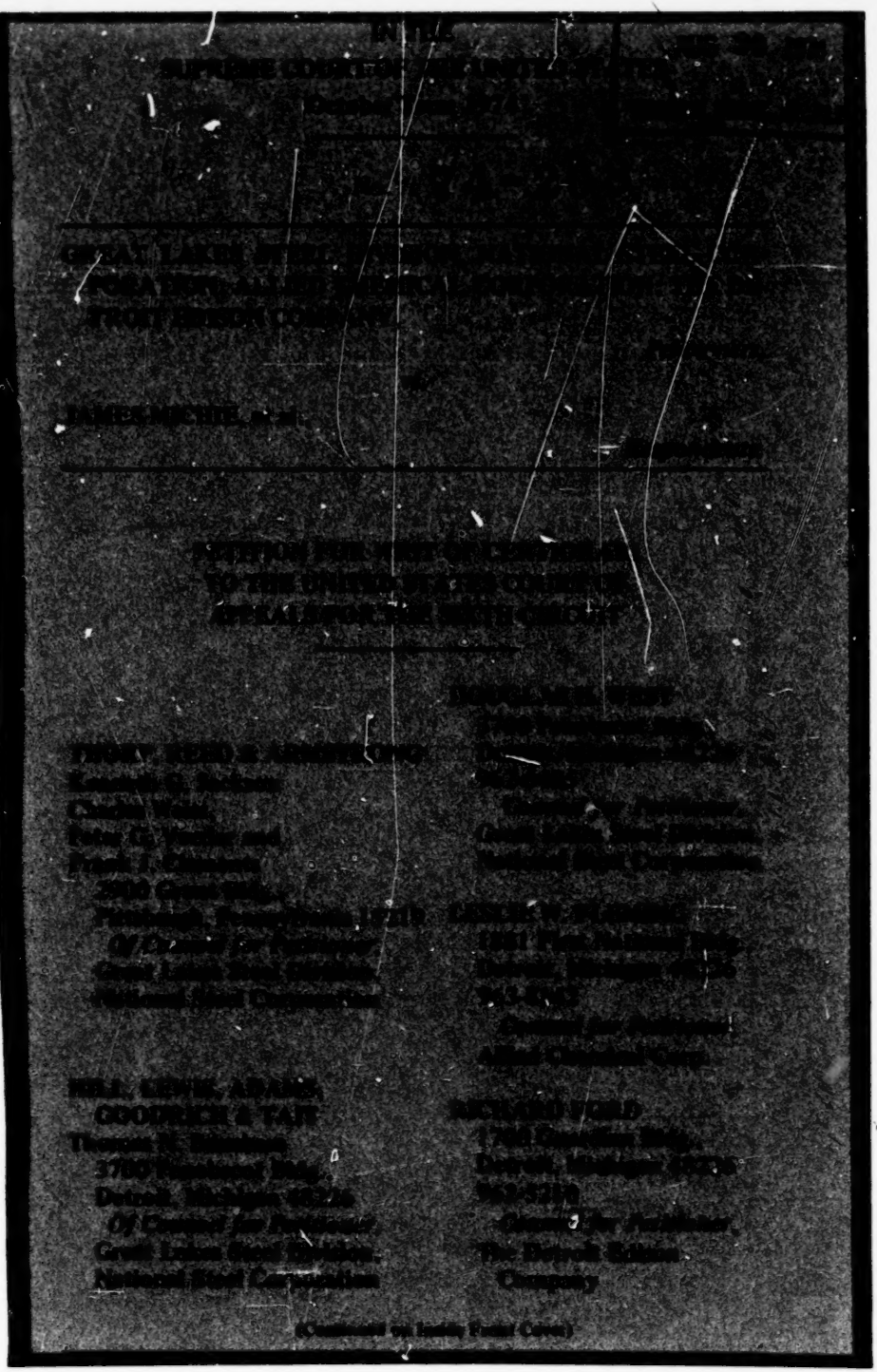

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IN THE SUPREME COURT OF THE UNITED STATES
October Term 1974
No.

GREAT LAKES STEEL DIVISION, NATIONAL STEEL CORPORATION, et al.,

Petitioners,

vs.

JAMES MICHIE, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, GREAT LAKES STEEL DIVISION, NATIONAL STEEL CORPORATION, ALLIED CHEMICAL CORPORATION and THE DETROIT EDISON COMPANY, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in these proceedings on April 4, 1974.

OPINIONS AND ORDERS BELOW

The judgment of the Court of Appeals, from which this appeal is sought, reviewed the following Memorandum Opinion and Order of the United States District Court, Eastern District of Michigan, Southern Division, certified by it under the provisions of 28 U.S.C. §1292(b) as containing controlling issues of law, to-wit:

1. Memorandum Opinion denying Defendants' Motions to Dismiss for Lack of Jursidiction, dated November 10, 1971 (29a).

2. Order denying Defendants' Motion for Reconsideration or Rehearing on Motion to Dismiss for Lack of Jurisdiction, dated January 10, 1973 (37a).

The judgment of the United States Court of Appeals for the Sixth Circuit is reported in *Michie* v. *Great Lakes Steel Division,*

National Steel Corp., 495 F.2d 213 (6th Cir. 1974). Separate Petitions for Rehearing were filed on May 1, 1974 by Defendants, Great Lakes Steel Division, National Steel Corporation, Allied Chemical Corporation and The Detroit Edison Company. The three Petitions were denied by the Court of Appeals by order dated June 7, 1974. (66a).

JURISDICTION

The judgment and opinion of the Court of Appeals for the Sixth Circuit was entered April 4, 1974. Timely Petitions for Rehearing were filed by the Defendants.

The Order of the Court of Appeals denying the Defendants' Petitions for Rehearing was entered on June 7, 1974. This Petition for Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I

In the absence of clear and established state law, may a Federal District Court sitting in diversity disregard an almost universally accepted rule and assume that the state court would initiate a new and distinctly minority rule imposing joint and several liability for nuisance upon a named few of many independently acting persons contributing to the pollution of the ambient air, which allegedly caused injury to plaintiffs?

The Court below answered: YES

Petitioners submit that the answer is: NO

II

Did the Circuit Court below deny Petitioners their fundamental right of due process by holding that a single defendant could be compelled to pay the entire amount of a judgment for Plaintiffs' injuries, in the circumstances of an infinitude of independent persons contributing to pollution of the ambient air, constituting an alleged nuisance causing Plaintiffs' injuries, where no right of contribution could be established?

The Court below answered: NO

Petitioners submit that the answer is: YES

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution, Amendment V provides:

> AMENDMENT V CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Statutes:

Judicial Code, 28 U.S.C. § 1254(1) provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Judicial Code, 28 U.S.C. § 1292(b) provides:

> § 1292. Interlocutory decisions
>
> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Judicial Code, 28 U.S.C. §1332 provides:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further*, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico. June 25, 1948.

Michigan Statute – M.C.L.A. §600.2925. Contribution Between Joint Tort-feasors provides:

(1) **Requisites and amount.** Whenever a money judgment has been recovered jointly against 2 or more defendants in an

action for bodily injury or death resulting therefrom, or property damage, and such judgment has been paid in part or in full by 1 or more of such defendants, each defendant who has paid more than his own pro rata share is entitled to contribution with respect to the excess so paid over and above the pro rata share of the defendant or defendants making such payment. Joint tort-feasors who are summoned in as third party defendants pursuant to court rule may likewise be liable for contribution. No person may be compelled to pay to any other defendant an amount greater than his pro rata share of the entire judgment.

(2) **Release of 1 joint tort-feasor not bar to action against others.** It shall be lawful for all persons having a claim or cause of action against 2 or more joint tort-feasors to compound, settle with, and discharge, at any time prior to rendition of a judgment in said action, any and every one or more of said joint tort-feasors for such sum as such person may deem fit, without impairing the right of such person or persons to demand and collect the balance of said claim or cause of action from the remaining joint tort-feasors, against whom such person, or persons, has such claim or cause of action, and not so released.

(3) **Right of insurer of 1 joint tort-feasor to contribution from others.** An insurer of a person jointly or severally liable with 1 or more other persons upon a judgment for the same private wrong, which insurer has on behalf of its insured, discharged the common liability by payment, or has paid more than its insured's pro rata share thereof, shall be entitled to assert either in its own name or in the name of its insured any right to contribution which such insured would have acquired by such payment.

(4) **Claim for contribution, assertion within 6 months.** Any claim for contribution hereunder must be asserted within 6 months after discharge by such party of the common liability or payment of more than his pro rata share. P.A. 1961, No. 236, § 2925, Eff. Jan. 1, 1963.

STATEMENT OF THE CASE

Plaintiffs' Complaint (1a) was filed in the United States District Court in the Eastern District of Michigan, Southern Division,

by 37 individual Canadian citizens against three domestic corporations, alleging diversity jurisdiction under 28 U.S.C. §1332. By appropriate motions (23a, 24a and 25a), the Defendants challenged the existence of the requisite jurisdictional amount in controversy on the ground that such amount was separately required for claims of each Plaintiff against each of the Defendants. These motions were denied by the District Court by Memorandum Opinion dated November 10, 1971, (29a) wherein the Court held that the liability of the Defendants, if established, would be joint and several. Prior to entry of an Order pursuant to such Memorandum Opinion, the Defendants filed a Motion for Reconsideration or Rehearing (33a) on December 8, 1972. The District Court denied such Motion, but certified the jurisdictional question for appeal pursuant to 28 U.S.C. §1292(b) on January 10, 1973 (37a). On January 19, 1973, the Defendants filed Petitions for Permission to Appeal pursuant to said certification, which Petitions were granted on March 2, 1973. The Court of Appeals issued its judgment and opinion (40a) on April 4, 1974, holding that in the event the jury held in favor of Plaintiffs but was unable to apportion the harm among the multiple contributors to the pollution, the entire liability could be imposed upon one (or several) of the Defendants, subject to a subsequent right of contribution against all persons who contributed to the pollution. Although the Court's opinion assumed a right of contribution, such question was not presented in the briefs. The Defendants filed Petitions for Rehearing (49a, 55a and 64a) on May 1, 1974 asserting that the court had not only failed to follow the mandate of *Erie R.R. Co.* v *Tompkins*, 304 U.S. 64 (1938) but had also deprived Defendants of fundamental due process on the erroneous assumption that Defendants could establish a right of contribution. Said Petitions were denied by Order entered by the Court of Appeals on June 7, 1974.

REASONS FOR GRANTING THE WRIT

The Complaint alleges that the 37 individual Plaintiffs, citizens of Ontario, Canada, suffered personal injuries and property damages as a result of an alleged continuing nuisance created by pollution of the ambient air carried across the Detroit River into Canada and into the vicinities of Plaintiffs' residences. The Complaint further alleges that emissions resulting from the operation

of Defendants' industrial facilities have contributed to such pollution. Although each of the Plaintiffs alleged damages in excess of $10,000.00, no one of the Plaintiffs alleged which Defendant was responsible for any particular damages suffered by any Plaintiff. There is therefore no claim by any Plaintiff against each Defendant, in the jurisdictional amount of $10,000.00.

The Detroit metropolitan area is a highly industrialized community - particularly in the "down river" area where the Defendants' facilities are located. The commercial and industrial establishments in the area which emit contaminants into the ambient air number in the hundreds and motor vehicles and other sources number in the millions.[1] The actual number of sources of air contaminants in the area is indeterminable.

It was the holding of the courts below that if the three named Defendants are found to have *contributed* to a nuisance of pollution of the ambient air causing injuries to the Plaintiffs, which injuries are not separately and distinctly shown to have been caused by any one particular Defendant, *each and every* Defendant will be separately liable for *all* of the Plaintiffs' injuries, notwithstanding the fact that none of the emitters of contaminants (Defendants and others) acted in concert and notwithstanding the fact that the emissions from any one source might not, by itself, have been injurious to Plaintiffs.

This holding appears on the surface to treat only the simple and narrow issue of sufficiency of jurisdictional allegations based upon a construction of substantive state law. The effect of the Court's holding, however, is of vastly greater and far reaching significance in that it (1) reverses established precedent in the application of the *Erie* doctrine in the United States Court of Appeals for the Sixth Circuit and conflicts with decisions of other United States Courts of Appeals; (2) sanctions the denial of fundamental due process of law to Petitioners and all prospective co-defendants

[1] In their Brief filed in the Court of Appeals, Plaintiffs made reference to the Joint Air Pollution Study of St. Clair-Detroit River Areas, prepared by the International Joint Commission, Canada and the United States, which identified in excess of 100 major emitters of contaminants carried across the international boundary of the Detroit River. The emissions of 130 sources comprised only approximately 8% of the hydrocarbon and 68% of the particulate of the total air contaminants.

that may be added in the instant case; and (3) involves issues of great national and international importance not only to Petitioners but to all current and potential Defendants in pollution litigation.

I

THE DECISION BELOW REVERSES PREVIOUS DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEAL.

The principal question presented to the Court of Appeals, as stated by the Court, was as follows:

> "Under the law of the State of Michigan, may multiple defendants, whose *independent actions* of allegedly discharging pollutants into the ambient air thereby allegedly create a *nuisance*, be jointly and severally liable. . . ."[2] (Emphasis Added)

A detailed discourse into the subject of the substantive Michigan law on this issue is neither pertinent nor necessary. Suffice it to say that Michigan law on this question has not been established.[3] It is unquestionable, however, that the majority or universally

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[2] *Michie* v. *Great Lakes Steel Division, National Steel Corp.*, 495 F.2d 213, 215 (6th Cir. 1974).

[3] Indeed, the fact that the Michigan Supreme Court has never ruled on the precise issue, was acknowledged by the Court of Appeals at page 218, where it stated, "In this diversity case Michigan law is not finally and conclusively declared". There is, however, indication that Michigan follows the universal rule denying joint and several liability in cases involving multiple independent tortfeasors. See *Meier* v. *Holt*, 347 Mich. 430, 80 N.W. 2d 207 (1957); *DeWitt* v. *Gerard*, 281 Mich. 676, 275 N.W. 729 (1937); *Frye* v. *City of Detroit*, 256 Mich. 466, 239 N.W. 886 (1932); *Robinson* v. *Baugh*, 31 Mich. 290 (1875). In addition, the Michigan Supreme Court has followed the lead of the *Restatement of Torts*, §§879, 881 (1939) and comments thereto. In fact, the Court of Appeals relied heavily on *Maddux* v. *Donaldson*, 362 Mich. 425, 108 N.W. 2d 33 (1961), an auto negligence case in which joint and several liability was imposed on two defendants, wherein the Michigan Supreme Court expressly acknowledged the distinction between negligence cases and nuisance cases and in support of such distinction cited the *Restatement* and the sections thereof cited above.

accepted rule on such issue holds that there would be no such joint and several liability for nuisance.[4] The Court of Appeals ignored these authorities, however, and ruled that the defendants would be jointly and severally liable because of the "injustice" of requiring Plaintiffs to prove that a certain Defendant's emissions caused particular damages to Plaintiffs. The Court of Appeals therefore followed a distinctly minority rule and resolved the *Erie*[5] issues by stating:

> "Like the District Judge, we see a *close analogy* between this situation and the *Maddux* case. We believe the Michigan Supreme Court would do so likewise."[6] (Emphasis added)

It is respectfully submitted, however, that where direct authority exists, it must be followed;[7] but where as here, the authority relied upon by the Court of Appeals is indirect and does not rise to the level of a clear state court pronouncement, *Erie* does not permit the use of a "*close analogy*" to support the extension of an "emerging" and purportedly "better" legal philosophy in the face of an existing and almost universally accepted rule on such issue.

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[4] The almost universal rule is set forth in Cooley, *Torts* §88 at 783-4 (4th Ed. 1932) and Prosser, *Law of Torts* at 628-9 (3d Ed. 1964). As was the situation with the *Restatement*, both of these treatises were cited by the court in *Maddux* but not accepted by the Court of Appeals.

The case of *Landers* v. *East Texas Salt Water Disposal Co.*, 151 Tex. 251, 248 S.W. 2d 731 (1952) was cited by the Court of Appeals to support its holding. Although *Landers* is distinguishable from the instant case, while adopting a minority rule, it also clearly stated the majority rule on the issue in the case before it:

"But with the exception of Oklahoma and Kansas [citations omitted], the courts of the country seem to be virtually unanimous in refusing to impose joint and several liability on multiple wrongdoers whose independent tortious acts interfere with a landowner's interest in the use and enjoyment of land by interfering with his air or water. *Restatement of the Law of Torts*, Vol. 4, p. 449 Sec. 881; Cooley on Torts, 4th Edition, Vol. 1, pp. 283-287; 9 A.L.R. 947-952; 35 A.L.R. 412; 91 A.L.R. 763-765." 151 Tex. at 255, 248 S.W. 2d at 733.

[5] *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938).

[6] *Michie*, *supra*., at 218.

[7] See discussion of *Maddux*, and the *Restatement of Torts*, §§ 878, 881, *supra*, n. 3.

Under the *Erie* doctrine, a Federal Court sitting in a diversity case must follow substantive state law. In *Werthan Bag Co.* v. *Agnew*, 202 F.2d 119 (6th Cir. 1953), the Court of Appeals established for the Sixth Circuit the approach to be taken when faced with an absence of a clear pronouncement by the highest state court on a particular rule of substantive law. This approach, also adopted in the majority of circuits, is the recognition of the universal or majority rule and the application thereof, notwithstanding a claim that an emerging minority rule may be "better" or "more equitable." In establishing such approach the Sixth Circuit in *Werthan Bag* stated as follows:

> In *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139, the [*Erie*] doctrine was extended further to require the federal courts in such cases, where the highest court of the state has not pronounced on the subject, to ascertain from all the available data what the state law is and to apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts.
>
> We think these two opinions of the Supreme Court, [*Erie* and *West*] considered together, reveal how strongly the Supreme Court intended to restrict the federal courts in the pronouncement of their own views of the common law when inconsistent with the opinions of the state courts. It would seem that, in the teeth of such intended curtailment, this court would not be privileged to declare the law of Arkansas to be contrary to the *universal law applied in the other states whose courts have spoken upon the subject.*"[8] (Emphasis added)

Petitioners submit that by its decision in the instant case, the Court of Appeals has now reversed *Werthan Bag*, and intends *to predict* what the substantive law of a state *will be*. This departure from the application of the universal or majority rule, in addition to being in conflict with its own decision, is squarely opposed to the approach followed in at least four other circuits.

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[8] 202 F.2d at 124-125.

For example, in citing *Werthan Bag* with approval, the Tenth Circuit in *Criqui* v. *Blaw - Knox Corp.* 318 F.2d 811 (10th Cir. 1963), has stated:

> "Where there is a conflict in the decisions of the state courts of our country, the federal court construing the law of the state in question, will assume that the courts of that state will follow the weight of authority."
>
> "And, we are constrained to say that we agree with some of the cirticisms of the majority rule as pointed out in these articles and by the appellant. However, there can be no doubt but what the denial of such an action remains the majority rule."
>
> "We, of course, recognize that the modern trend does appear to favor the appellant's position and that the Supreme Court of Kansas, in the absence of statutory prohibitions, may some day lay down such a rule. Nevertheless, that decision should come in the first instance from the Kansas Court and not from this court."[9]

The Third Circuit is also in agreement with this approach as indicated by its holding in *Small* v. *United States*, 333 F.2d 702 (3rd Cir. 1964), wherein the court stated at page 704:

> "We have found no [Delaware] case in point, and those cited by the plaintiff are inapposite. We therefore assume that the courts of Delaware would follow the majority rule upon which the first part of our decision rests."

The philosophy supporting the view that the federal courts should not be free to speculate as to how the state courts might rule, and therefore should apply the majority rule on the issue, was further expressed by the Fifth Circuit in *Polk County, Georgia* v. *Lincoln National Life Ins. Co.*, 262 F.2d 486 (5th Cir. (1959),

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[9] 318 F.2d at 812, 813, 814. *See also United States* v. *Jones*, 229 F.2d 84 (10th Cir. 1955) *cert. denied*, 351 U.S. 939 (1956) and *Mills* v. *Hoffah*, 465 F.2d 29 (10th Cir. 1972).

wherein the court took the opportunity to specifically disagree with the Second Circuit, which at that time had taken the contrary view:[10]

> "In the Second Circuit, in an opinion where Judge Frank spoke for the court, it was said:
>
> 'Perhaps the guessing-guide is this: What would be the decision of reasonable intelligent lawyers, sitting as judges of the highest New York Court, and fully conversant with New York 'jurisprudence'? An alternative test is what we conjecture would be the decision of the particular judges who now constitute that court. Probably the presumption is that the result of the two tests would be identical; but happily we are relieved from the need of considering that question, because, knowing the sitting judges, we feel certain that such a presumption accords with the facts.' *Cooper* v. *American Airlines*, 2 Cir., 1945, 149 F.2d 355, 162 A.L.R. 318. *Cf.* Frank, *Law and the Modern Mind*, 148 et seq.
>
> If the views so expressed are to prevail it would seem that the Federal Courts, in their search for a rule of state law, would be attempting to psychoanalyze state court judges rather than to rationalize state court decisions."[11]

Thus, at least four circuits have clearly enunciated the approach suggested by Petitioners.

In addition to the intra-circuit conflicts existing in the Second[12] and Sixth Circuits, the Ninth Circuit has recently changed its position on this issue. In *Summers* v. *Wallace Hospital*,

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[10] The Second Circuit has since abandoned its view that the federal courts may speculate as to how the state courts may rule and is currently taking a position consistent with that of Petitioners. *See Lee* v. *Jenkins Brothers*, 268 F.2d 357 (2nd Cir. 1959) wherein it is stated at page 364:

> "The Connecticut cases have not yet quite come to grips with the question. Hence, it is necessary to consult the 'general' law on the subject, on the assumption that, if a general rule can be found, Connecticut would follow it."

[11] 262 F.2d at 489.

[12] Footnote 10, *supra*.

276 F.2d 831 (9th Cir. 1960), the Ninth Circuit determined that the Idaho Supreme Court had not ruled on the precise question of state law involved and then applied the majority rule followed by other state courts. However, in *Klingebiel* v. *Lockheed Aircraft Corp.*, 494 F.2d 345 (9th Cir. 1974), the Ninth Circuit appearing at first blush to apply the majority rule actually suggested the opposite approach as follows:

> "[T]he duty of the federal court is to ascertain and apply the existing California law, not to predict that California may change its law and then to apply the federal court's notion of what the change might or ought to be...
>
> *Only when the question has not been decided in California do we have the doubtful privilege of 'first guessing' what the California courts might do.*" [13] (Emphasis added)

This approach of "first guessing" is obviously in irreconcilable conflict with the approach of the Second, Third, Fifth and Tenth Circuits.

From the foregoing, it is apparent that there is a lack of unanimity among the Circuits as to how *Erie* is to be applied in cases where there is no state court pronouncement on the precise issue involved. There being no definitive direction from this Court on such question, an inter-circuit conflict exists, and several Circuits, including the Court of Appeals below, are changing their respective positions on the question, increasing the magnitude of the conflict and confusion. It is therefore respectfully submitted that this conflict and confusion on so important an issue as the proper application of the *Erie* doctrine can and should be effectively resolved only by prompt review by this Court.

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[13] 494 F.2d at 346-347.

II

COMPELLING A SINGLE DEFENDANT TO PAY FOR THE ENTIRE AMOUNT OF PLAINTIFFS' INJURIES WHERE THERE IS AN INFINITUDE OF PERSONS CONTRIBUTING TO THE NUISANCE CAUSING SUCH INJURY, BY THEIR SEPARATE AND INDEPENDENT ACTS, DENIES TO SUCH DEFENDANT FUNDAMENTAL DUE PROCESS OF LAW, WHERE NO RIGHT OF CONTRIBUTION CAN BE ESTABLISHED.

The Court of Appeals expressed what appears to be the underlying rationale of its decision to impose joint and several liability on the Defendants, as follows:

> "Where the injury itself is indivisible, the judge or jury must determine whether or not it is practicable to apportion the harm among the tortfeasors. If not, the entire liability may be imposed upon one (or several) tortfeasors *subject, of course, to subsequent right of contribution among the joint offenders.*"[14] (Emphasis added)

It is apparent that the Court of Appeals relied upon the mitigating effect of a right of contribution to avoid a denial of fundamental due process of law guaranteed by the Fifth Amendment to the United States Constitution, which would otherwise be the result of a holding that one person may be held responsible for the independent acts of others over which he has absolutely no control. Petitioners submit, however, that under applicable Michigan law, a Defendant compelled to pay a judgment in this case could not establish a right of contribution.

There exist in Michigan two sources of authority under which one may seek a right of contribution — statutory and equitable. The Michigan statute dealing with the right of contribution[15] is applicable only to "joint-tortfeasors." Under the reasoning of the Circuit Court below, however, Petitioners are not "joint-tortfeasors," but rather are independent tortfeasors who may be held jointly and severally liable. Therefore, under Michigan law, and contrary to the assumption of the Court below, Petitioners have

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[14] 495 F.2d at 217.

[15] M.C.L.A. §600.2925, "Contribution Among Joint-Tortfeasors." This statute was referred to in footnote 3 of the Court's opinion.

no *statutory* right of contribution from other independent emitters of air contaminants.[16] Petitioners must therefore rely solely upon the judicial doctrine of "equitable contribution" to avoid the unjust imposition upon them of liability for Plaintiffs' injuries not caused by them.

In the recent decision of *Moyses* v. *Spartan Asphalt Paving Co., Id.*, the Michigan Supreme Court declared that there exists in Michigan an equitable (non-statutory) right of contribution, applicable to non-joint wrongdoers.

> "[We] have decided to overrule what is left of Michigan's Common-law bar of contribution between . . . 'wrongdoers,' . . . Such overrulement will leave the issue of contribution to equitable principles as known hitherto and now in matters of express or implied contract."[17]

If Petitioners are able to satisfy these "equitable principles" of contribution, they might not be solely responsible for bearing the entire cost of Plaintiffs' alleged injuries, resulting from ambient air pollution contributed to by thousands of other sources. As set forth below, however, the nature of the wrong complained of effectively precludes Petitioners from obtaining such equitable contribution.

In a case involving tortious conduct, a Defendant seeking equitable contribution must be able to apportion the cost of the harm done amongst himself and those from whom he seeks contribution, in order to sustain the burden of proof imposed by the equitable rule of contribution. If a Defendant cannot prove that he has been compelled to pay more than his "share" of the damages, he will be unable to obtain contribution since he will be unable to demonstrate that his payment of the full damages is inequitable.[18] But a Defendant who has had the entire liability

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[16] This result is clearly indicated by the Michigan Supreme Court's opinion in *Moyses* v. *Spartan Asphalt Paving Co.*, 383 Mich. 314, 331, 174 N.W. 2d 797, 804 (1970).

[17] 383 Mich. at 334-335, 174 N.W. 2d at 806.

[18] *Lorimer* v. *Julius Knack Coal Co.*, 246 Mich. 214, 224 N.W. 361 (1929).

for Plaintiffs' injuries imposed upon him under the opinion of the Court below, will, by definition, already have demonstrated his inability to sustain such burden. The Court of Appeals below stated:

> "Where the injury itself is indivisible, *the judge or jury must determine whether or not it is practicable to apportion the harm among the tortfeasors.* If not, the entire liability may be imposed upon one (or several) tortfeasors subject, of course, to subsequent right of contribution among the joint offenders."[19] (Emphasis added)

Thus, the Court has, in the same breath, said that there will be joint and several liability and that one independent tortfeasor can be compelled to pay the entire judgment if the harm cannot be apportioned amongst the multiple tortfeasors, but that they will have a right of contribution. This right, however, requires the same apportionment of the harm, as a predicate for such contribution, as was in issue with respect to the question of joint and several liability in the first instance. Because the issue of apportionment of the harm would, of necessity, have already been determined against Petitioners, the "right" really does not exist at all.

Petitioners further submit that because of the circumstances of this case,[20] including an infinitude of polluters, any effective right of *total* contribution is illusory. Petitioners will be required to show that the damages paid by them are disproportionate to the harm inflicted. They will therefore be required to ascertain the identity of and the ratio of pollutants for which each such third person is or was individually responsible over the period in question. Because of the thousands or millions of third parties included, such a task is manifestly impossible. The effect of the ruling of the Court below is that one, or two, or three named Defendants will be liable to anyone injured by the nuisance of air pol-

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[19] 495 F.2d at 217.

[20] The factual setting in this case is obviously distinguishable from *Maddux, supra.*, and *Landers* v. *East Texas Salt Water Disposal Co., supra.*, cited by the court below. In each of those cases, the "wrongdoers" who were held jointly and severally liable were only two in number in each case, and were also parties to the action. There was in those cases no question of unknown or indeterminable third parties who were in any way responsible for Plaintiff's injuries, for which the party Defendants were to be held liable.

lution for the *entire* amount of such injury, no matter how small the contribution of such Defendant to the whole. Even if the question of apportionment of the harm has not already been legally foreclosed, he will then have to attempt to join all of the many thousands of persons contributing to the injury in a suit for contribution. Such a suit, however, would be clearly unmanageable and would indeed be an exercise in futility.

The result of the decision below is therefore clear. Petitioners may be held individually liable for the independent acts and conduct of others over whom they have no control, even though the separate actions of each Defendant may not itself have been actionable. At the same time, Petitioners are effectively denied both the right, as a legal matter, and a remedy, as a practical matter, of contribution from others who clearly contributed to the nuisance and injury complained of. Property may not be taken from one to satisfy the wrong done by another without at least permitting a recourse for restitution. To take a man's property with one hand and give him a non-existent remedy with the other is not in accord with the sense of justice which pervades the Constitution and which is so clearly stated in the Fifth Amendment. It is respectfully submitted that such a result directly contravenes the fundamental principle that Petitioners' property shall not be taken without due process of law.

CONCLUSION

For the reasons above stated it is respectfully submitted that this Court should issue its Writ of Certiorari to review the judgment and opinion of the Court below.

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